

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION**

**METRO HEALTH FOUNDATION, INC.,
and METRO HEALTH FOUNDATION- MIDWEST, INC.
d/b/a CHEBOYGAN HEALTH CARE CENTER¹**

Employer

and

CASE 7-RC-22253

**LOCAL 79, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO**

Petitioner

APPEARANCES:

Marc A. Taylor, Attorney, of Atlanta, Georgia, for the Employer.
Angela C. Williams, Attorney, of Detroit, Michigan, for the Petitioner.

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, hereinafter referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record² in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

¹ The name of the Employer appears as amended at the hearing.

² The Employer filed a timely brief, which was carefully considered. The Petitioner did not file its brief until two after its due date. Consequently, the Petitioner's brief is not part of the record herein.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

The Petitioner seeks to represent a unit of approximately 15 full-time, regular part-time and contingent registered nurses (RNs) employed by the Employer at its nursing home located in Cheboygan, Michigan.³ The Employer contends that the petitioned-for unit is inappropriate in that the RNs are supervisors within the meaning of Section 2(11) of the Act. I find that the Employer has not satisfied its burden of proof that the RNs are supervisors based on their authority, inter alia, to assign and direct other employees, issue Employer memorandums, prepare evaluations, and handle staff shortages.

The Employer, Metro Health Foundation, Inc. and Metro Health Foundation-Midwest, Inc., d/b/a Cheboygan Health Care Center, is a Michigan corporation engaged in the operation of a nursing home providing long-term, residential medical care. Metro Health Foundation, Inc., headquartered in the State of Georgia, owns and operates the facility at issue in this matter, which is located in Cheboygan, Michigan. Metro Health Foundation-Midwest, Inc., consists of the Cheboygan Health Care Center, and other facilities located in Wisconsin and Indiana.

Cheboygan is a 120-bed facility. It currently has about 91 patients. The facility has four wings with a central nurses' station. Each of the wings has a numerical designation. The wings are numbered 500, 600, 700 and 800. Wing 800 is the Alzheimer's Unit. The Alzheimer's Unit is for patients with dementia or Alzheimer's who need special attention. The Alzheimer's Unit wing is smaller than the other wings, with only 14 beds. The care given in that unit is one-on-one.

The administrator and highest level at authority at the Cheboygan facility is Robert Norcross. Norcross reports to Larry Youles, who is employed by Metro Health Foundation in Georgia. The director of nurses (DON), Candy Pavowski, as well as the office manager and the heads of other departments (including building and maintenance,

³The Employer stipulated at the hearing that if the RNs are not supervisors, the unit is otherwise appropriate. There is no history of collective bargaining at the facility with respect to registered nurses.

dietary, activities, and social services) report to Norcross.⁴ The DON oversees the entire nursing staff, including RNs, licensed practical nurses (LPNs), certified evaluated nursing assistants (CENAs)⁵, and therapists.

Beneath the DON in the chain of command at the facility with respect to nursing are unit coordinators. Unit coordinators report directly to the DON. There are currently four unit coordinators; one for each wing of the facility: Ann Clark, Fran Jackson, Margaret Bowers,⁶ and Denise Evans.⁷ Unit coordinators are either LPNs or RNs, and are responsible for coordinating nursing care being provided to the residents on a specific wing. They ensure that patient charts are in order and prepare reports mandated by the State of Michigan.

The facility also has certain specialized categories of coordinators. Specifically, there are two MDS coordinators, Barbara Ardini and Eileen Hendrickson. "MDS (mini-data set)" refers to a State of Michigan regulation. Ardini and Hendrickson are responsible for documenting the status of the residents at intervals of months and transmit that to the state. They also develop care plans for residents based on this documentation. These patient care plans are maintained in the nurses' station on each hall. Candace Scott is the restorative coordinator. Scott works side-by-side with the therapists, making sure that residents maintain their highest potential for activities of daily living (ADLs). Darlene Graham is the staff development coordinator/instructor. Graham is mainly responsible for holding training classes at the facility, and also works with MDS.⁸

The Employer currently employs about 134 employees in total. There are dietary employees (20), housekeeping employees and laundry employees (15), maintenance employees (3), activities employees (5), social service employees (2), occupational and physical therapists (3), CENAs (44) and nurses (21 RNs and 9 LPNs, including unit coordinators and the MDS coordinator and restorative coordinator). Two of the 17 non-supervisory RNs are contingent employees.⁹ There are also about four office staff employees.

⁴ The parties stipulated, and I find, that all of these individuals are supervisors within the meaning of the Act, as they exercise independent judgment to direct, assign, and discipline employees.

⁵ The record established that certified evaluated nursing assistants are referred to interchangeably as either ENAs or CNAs. Consequently, this decision will use the abbreviation of "CENA" for that job classification.

⁶ Margaret Bowers is a "special unit coordinator" for the Alzheimer's Unit (wing 800).

⁷ The parties stipulated, and I find, that all of these individuals are supervisors within the meaning of the Act, as they exercise independent judgment to direct, assign, and discipline employees.

⁸ The parties stipulated, and I find, that Ardini, Hendrickson, Scott, and Graham are all supervisors within the meaning of the Act, as they exercise independent judgment to direct, assign, and discipline employees.

⁹ No party contends that the contingent employees should not be included in the petitioned-for unit.

Nurses¹⁰ report directly to unit coordinators, and indirectly to the DON. CENAs ultimately report to the DON, but they may report to the unit coordinator or the most senior nurse on duty where there is no DON or unit coordinator scheduled to work. Unit coordinators do not have the authority to fire nurses, but they may discipline both nurses and CENAs. Firing of nurses is done by the administrator or by the DON (with approval of the administrator). Nurses and CENAs are both paid hourly, and punch a time clock. CENAs are represented by AFSCME, and are paid pursuant to their current contract. Nurses are paid based on their level of work experience. Unit coordinators generally earn a higher rate of pay than non-supervisory nurses.

Scheduling of all employees is handled by the scheduling office. There are three shifts: the day shift (6 a.m. to 2 p.m.), the afternoon shift (2 p.m. to 10 p.m.), and the midnight shift (10 p.m. to 6 a.m.). The minimum number of nurses per shift is based on the acuity of the patients. "Acuity" is the functioning level of a particular patient, i.e., how much care and attention he/she needs. Generally, there are four RNs on the morning shift, three or four on the afternoon shift, and about two or three on the midnight shift. There is one LPN on the day shift, one on the afternoon shift, and the rest are contingent (except for the LPN coordinators). All nurses work every other weekend. There are 11 CENAs on the day shift, and 8 on the afternoon shift and the midnight shift. They are spread out evenly among the wings (i.e., if there are eight present, two per wing.) Therapists all work on the day shift.

Nurses are generally assigned to work by their availability. Mostly, the nurses rotate among the wings rather than being assigned to one particular wing. Unit coordinators serve as nurses on their wings when necessary, such as when someone calls in sick, or if they are short nurses. They also work as nurses on weekends. Unit coordinators work various shifts, but generally they work the day shift. However, they are responsible 24 hours/7 days a week for what occurs at the facility. Unit coordinators work 40 hours a week doing both nursing duties and coordinating duties. The amount of time spent on nursing duties versus coordinating duties varies from week to week.

The general responsibilities of the nurses is dictated by their professional training and the patient care plans created by the unit coordinators. Registered Nurse Susan Schreffler sees her main responsibilities as passing medications to residents and generally caring for the residents based on her training as a nurse. However, if a nurse is the most senior person on the floor, the nurse generally has additional responsibilities. This mostly occurs on the afternoon shift, midnight shift, and weekends. There is usually only one nurse working on a wing each shift. At times, there may be one nurse for two wings. Where there is no admitted supervisor on duty, the nurse is ultimately responsible for the

¹⁰ Throughout this decision, the term nurses will refer generally to both RNs and LPNs, as the evidence supports that there is no distinction between the type of work performed by RNs and LPNs at this facility.

wing. However, unit coordinators, along with the DON, are on-call on a rotating basis so that one is always available for consultation by the nurses.

CENAs are responsible for helping residents by assisting them with their activities of daily living, i.e., brushing teeth, combing hair, bathing, eating, and transporting them to activities. Nurses oversee the CENAs that are assigned to work on their wing. This is required pursuant to State law. Patients have needs that vary very from shift-to-shift and day-to-day and nurses may assign CENAs to take care of those needs.. Tasks assigned to CENAs by nurses also include washing wheelchairs, cleaning the refrigerator or utility room, and taking monthly vital signs of patients, such as weight. Generally, there is a task list that is followed on particular days and for particular shifts, such as cleaning hair brushes and combs, or cleaning the refrigerator or the utility room. The nurse decides which CENA to assign to do a particular task. The nurses prioritize and can change assignments if something more urgent arises. Usually, however, CENAs do not need to be instructed on what to do. The CENAs consult the patient care plans, use their own independent judgment with respect to patient care based on their experience with a particular patient, police themselves, and make group decisions as to who will handle what task. Senior CENAs are usually responsible for training newer CENAs.

Nurses can assign breaks to CENAs. This is done when work assignments are made at the start of the nurse's shift. Nurses usually attempt to assign lunch breaks halfway through the shift, and a 15-minute break near the start of the shift and one near the end of the shift, in such a way that there is adequate coverage on the floor. Often, the CENAs decide among themselves when they will take a break and work together to ensure adequate floor coverage at all times. Although a nurse can order a CENA to return from a break if needed, there is no evidence that this has actually occurred. Generally, the CENAs police themselves and know if it is too busy for them to take their scheduled break. When this has occurred, CENAs have taken their break at a later time, or not at all, without being instructed to do so.

Nurses can transfer CENAs among wings on a given shift as needed due to staffing shortages or patient needs. CENAs must call the staffing office if they cannot report to work. Nurses take call-in's from CENAs who cannot make their shift when the staffing office is closed. Nurses cannot approve vacation or sick leave. The purpose of contacting the nurse during off-hours is so the nurse can take steps to ensure adequate floor coverage. When a CENA calls in, the senior charge nurse or the unit coordinator, whoever is present, is responsible for replacing the CENA or moving CENAs around the units for coverage. There is a list of phone numbers for the nurse to call to try to get a replacement and a written procedure for calling employees in to work from an on-call list.

The CENAs' union contract states that a supervisor can mandate overtime to meet State regulations. The nurses follow a point system to ensure adequate floor coverage. A

certain number of points are assigned to an employee based on whether the employee is an RN, LPN, or CENA (i.e., more points are given for an RN than for a CENA). The total points for employees on the floor must reach a minimum number, which is determined by the current acuity level of the patients. For example, if a CENA calls in sick, and consequently the floor is short 4 points for 1 hour, the nurse may ask that each of the 4 CENAs currently working stay over an extra 15 minutes to meet the minimum required coverage. In practice, mandating overtime is not a frequent occurrence because oftentimes CENAs will volunteer for the overtime. As described above, the CENAs may all stay over to provide coverage. Usually, this is a group decision that is reached by the CENAs. However, if a case arose where no CENA volunteered to work, the most senior person on the floor, whether that be the unit coordinator or the nurse, may have no other option but to require someone to stay over their shift. No RNs could recall this ever occurring.

If a CENA works past the scheduled shift or if the schedule is changed, the CENA must make the change on the schedule sheet on the nurse's clipboard. The nurses may initial the changes. This is an informal unwritten policy.

Nurses may serve in a reportorial role when CENAs are disciplined. Nurses can write CENAs up for not doing their job, not getting back from lunch on time, not feeding a patient, or not cleaning a patient after they have eaten, etc. The nurses cannot terminate CENAs. If there is a disciplinary problem, the nurses generally prepare employee memorandums which they submit to the DON. These memorandums are evaluated by the administrator or the DON, and make a decision as to the type of discipline, if any, to be issued. Ultimately, an employee memorandum could impact or lead to disciplinary actions such as non-paid days off, and, after a series of warnings, it could lead to dismissal. If the DON makes a decision to terminate an employee, the administrator must approve of it. However, he does not have to sign off on each discipline issued to a CENA. Instead, if an employee is going to be terminated, the DON prepares a "synopsis" of what lead to the action. The copies of the disciplines that have issued are attached to the synopsis.

Nurses can counsel CENAs. If a nurse is the most senior employee in the building, and a family member of a patient comes in with a complaint, the nurse may deal with it, or may call the administrator or the nursing director depending on the severity of the problem. The nurses may take complaints about CENAs from family members. There are complaint forms that the nurse or the family member can fill out.

Nurses can also counsel CENAs on a day-to-day basis regarding job deficiencies. Nurses can send CENAs home if they became irate or belligerent, abusive to patients, or are intoxicated. However, there is no evidence of this ever occurring.

Nurses prepare performance evaluations of CENAs. The evaluations are performed after a 90-day probationary period and then annually, and do not affect the wages and benefits of CENAs. The nurse who has worked with a particular CENA the most throughout the year performs the evaluation. The evaluations are based on observations the nurse has made throughout the year. When the nurses perform the evaluations, they may or may not discuss it with the CENA. They submit the evaluation to the nursing director, who calls the CENA into her office, reviews the evaluation with the CENA, and counsels him or her if the review is poor. The CENAs sign off on the evaluations; if they disagree with it, they have the right to submit a rebuttal. The evaluation goes into the personnel file of the CENA, and is not used for anything else. The apparent purpose of the evaluation is that it is required by the State.

Section 2(3) of the Act excludes from the definition of the term “employee” “any individual employed as a supervisor.” Section 2(11) of the Act defines a “supervisor” as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is to be interpreted in the disjunctive and the possession of any one of the authorities listed in that section places the employee invested with this authority in the supervisory class. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949); *Allen Services Co.*, 314 NLRB 1060 (1994). However, the Board is mindful not to deprive employees of their rights under Section 7 by interpreting the term supervisor too broadly. *Unifirst Corp.*, 335 NLRB No. 58, slip op. at 8 (Aug. 27, 2001).

In *NLRB v Kentucky River Community Care*, 532 U.S. 706 (2001), the Supreme Court upheld the Board’s longstanding rule that the burden of proving Section 2(11) supervisory status rests with the party asserting it. See *Ohio Masonic Home*, 295 NLRB 390, 393 fn.7 (1989); *Bowen of Houston, Inc.*, 280 NLRB 1222, 1223 (1986). However, the Court rejected the Board’s interpretation of “independent judgment” in Section 2(11)’s test for supervisory status, i.e., that registered nurses will not be deemed to have used “independent judgment” when they exercise “ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards.” 121 S.Ct. at 1863. Although the Court found the Board’s interpretation of “independent judgment” in this respect to be inconsistent with the Act, it recognized that it is within the Board’s discretion to determine, within reason, what scope or degree of “independent judgment” meets the statutory threshold. See *Beverly Health*

& Rehabilitation Services, 335 NLRB No. 54 (Aug. 27, 2001). The Court also recognized in that the term “independent judgment” is ambiguous as to the *degree* of discretion required to establish supervisory status. The degree of discretion “that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer.” 121 S.Ct. at 1867. In discussing the tension in the Act between the Section 2(11) definition of supervisors and the Section 2(12) definition of professionals, the Court also left open the question of the interpretation of the Section 2(11) supervisory function of “responsible direction,” noting the possibility of “distinguishing employees who direct the manner of others’ performance of discrete tasks from employees who direct other employees.” 121 S.Ct. at 1871. See **Majestic Star Casino**, 335 NLRB No. 36 (Aug. 27, 2001).

For instance, direction as to a specific and discrete task falls below the supervisory threshold if the use of independent judgment and discretion is circumscribed by the superior’s standing orders and the employer’s operating regulations, which require the individuals to contact a superior when anything unusual occurs or when problems occur. **Dynamic Science, Inc.**, 334 NLRB No. 56 (June 27, 2001); **Chevron Shipping Co.**, 317 NLRB 379, 381 (1995).

When performing patient care and assigning tasks to CENAs, the RNS herein are typically following patient care plans developed by unit care coordinators. They also assign tasks according to a task list created and maintained by the Employer. The limited authority of RNs to assign discrete tasks to less skilled employees based on standing orders or what is dictated by their profession does not require the use of independent judgment in the direction of other employees. **Ferguson Electric Co.**, 335 NLRB No. 15 (Aug. 24, 2001). Furthermore, the weight of the evidence suggests that the assignments are routine in nature, and are based mainly on principles of fairness and the even distribution of work. **Byers Engineering Corp.**, 324 NLRB 740 (1997); **Providence Hospital**, *supra*; **Ohio Masonic Home**, *supra*.

RNs do not generally follow up on the work of CENAs to ensure that a task has been done correctly. However, if they notice an error or omission they will point it out. While RNs do prepare evaluations of CENAs based on their observations, the Employer does not utilize the evaluations to affect employees’ status or tenure. The nurse’s input is not a recommendation of reward or discipline, but rather a first-hand progress report. This is not supervisory. **Custom Mattress Mfg.**, 327 NLRB 111 (1998); **Ten Broeck Commons**, 320 NLRB 806, 813 (1996); **Passavant Health Center**, 284 NLRB 887 (1987).

The nurse’s responsibility in the area of discipline is to serve as a conduit by reporting misbehavior and distributing prepared notices. Higher management, which independently investigates and determines penalties for misconduct, does not elicit nurse recommendations in the process. The Board has repeatedly held, with court approval,

that a reportorial function is not sufficient to support a supervisory finding. ***Ohio Masonic Home***, 295 NLRB 390 (1989); ***NLRB v. Attleboro Associates, Ltd.***, 176 F.3d 154, 174 (3rd Cir. 1999); ***NLRB v. Grancare, Inc.***, 170 F.3d 662, 668 (7th Cir. 1999); ***NLRB v. City Yellow Cab Co.***, 344 F.2d 575, 580-581 (6th Cir. 1965).

Although nurses may send a CENA home in certain instances, an ultimate decision as to discipline is made by higher management. In one cited instance, a nurse called the DON after two CENAs walked off the job and asked what she should do. Based on instructions from the DON, the nurse made a note of the incident and the nursing director ultimately made a decision to fire the two CENAs. No nurse has ever suspended an individual, and even if the nurse could do so, possessing authority to take limited action in response to flagrant violations is insufficient by itself to establish supervisory status. ***Phelps Community Medical Center***, 295 NLRB 486, 492 (1989); ***Loffland Bros. Co.***, 243 NLRB 74, 75 fn. 4 (1979).

At times, nurses may address concerns or complaints by family members. Nurses have also transferred CENAs to different wings where two CENAs have had a dispute. The limited authority exercised by charge nurses to resolve interpersonal conflicts among employees does not confer supervisory status. ***St. Francis Medical Center-West***, 323 NLRB 1046, 1047-48 (1997).

For substantial periods of time during the latter part of the afternoon shift, the midnight shift, and on weekends, RNs are the highest-ranking employees on the premises. However, as a secondary indicia of supervisory status, standing alone it is insufficient to establish supervisory status. ***Juniper Industries***, 311 NLRB 109, 110 (1993). More significantly, nothing in the statutory definition of supervisor suggests that service as the highest-ranking worker on site requires supervisor finding. ***Training School of Vineland, 332 NLRB No. 152, slip op. At 1 (Dec. 15, 2000)***. In addition, the unit coordinators, the nursing director, and administrator are all on call 24-hours a day, 7 days a week.

Although nurses are responsible for making staffing decisions when scheduling problems arise during off-hours, generally employees volunteer or arrange to cover shifts and work overtime as necessary. Even if no one volunteers, the regular practice at the facility is for everyone to work over their shift until there is adequate coverage. Consequently, the asserted authority of nurses to mandate overtime is speculative since there have been no instances where a nurse has forced an employee to work overtime. ***General Security Services***, 326 NLRB 312 (1998), enfd. 187 F.3d 629 (8th Cir. 1999).

5. Accordingly, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time, regular part-time, and contingent registered nurses employed by the Employer at its facility located at 824 South Huron Street, Cheboygan, Michigan; but excluding all office clerical employees, unit coordinators, restorative coordinator, staff development coordinator/instructor, MDS coordinators, guards and supervisors, as defined in the Act, and all other employees.

Those eligible shall vote as set forth in the attached Direction of Election.

Dated at Detroit, Michigan, this 2nd day of July, 2002.

(SEAL) /s/ William C. Schaub, Jr.
William C. Schaub, Jr., Regional Director
National Labor Relations Board, Seventh Region
Patrick V. McNamara Federal Building
477 Michigan Avenue, Room 300
Detroit, Michigan 48226

177 8560 1000
177 8560 2800
177 8560 4000
177 8580 8050